2077/06

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R to D. R. (J)

(2) (4)

Single Bench

IN THE HIGH COURT OF CHHATTISGARH AT BILASPUR (C.G.)

Cr. A. No. 356 /2006

APPELLANT : Hasan Khan S/o Manawar Khan aged about 26 years, Occupation Agriculture, R/o Village Mudagaon Police Station Lailunga, Distt. Raigarh (C.G.)

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VERSUS

RESPONDENT : The State of C.G. Through P.S. Lailunga,Distt. Raigarh

CRIMINAL APPEAL UNDER SECTION 374(2) CRIMINAL PROCEDURE CODE

(41)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Cr. Appeal No.356/2006

Hasan Khan

Vs.

State of Chhattisgarh

Post for Judgment : 07.07.2006

Sd/-
Dilip Raosaheb Deshmukh
Judge

(42)

HIGH COURT OF CHHATTISGARH AT BILASPUR

Before: Hon'ble Shri Justice Dilip Raosaheb Deshmukh

Criminal Appeal No.356/2006

Hasan Khan

Vs.

State of Chhattisgarh

Shri R.R. Sinha, Counsel for the appellant.
Shri Parag Kotecha, Panel Lawyer for the State.

J U D G M E N T

(Delivered on this 7th day of July 2006)

This appeal is directed against the judgment dated 27.4.2006 delivered by Shri G.R.Sande, 4th Additional Sessions Judge (F.T.C.), Raigarh in Sessions Case No.76/2005 whereby while acquitting the appellant under Section 304-B of the I.P.C. the learned trial Judge convicted the appellant under Section 306 I.P.C. and sentenced him to R.I. for 5 years and a fine of Rs.200/- and in default to undergo R.I. for one month.

2. It is not disputed that Asiya Khatun, who was deaf and dumb, was married to the appellant four years prior to her death. A son was also born out of their wedlock. Asiya Khatun died of 95% burn injuries on 13.4.2005 in Community Health Center, Lailunga.

3. It was alleged by the prosecution that the appellant subjected the deceased to cruelty or harassment on account of demand for dowry soon before her death.

4. The learned trial Judge framed charge under Section 304-B IPC and in the alternative under Section 306 IPC which read as under:-

(A3)

(i) यह कि तुमने दिनांक 13.05.2005 के 19.30 बजे ग्राम – मुड़ागांव में थाना – लैलूंगा, जिला – रायगढ़ के अंतर्गत अभियोगिनी मृतिका आंशिया खातुन से दहेज के रुप में अवैध प्रतिभूति प्राप्त करने के लिए प्रताडित किये, परेशान किये, जिसके कारण मृतिका आशिया की मृत्यु विवाह के सात वर्ष के भीतर सामान्य से भिन्न परिस्थिति में हो गयी। एतद् द्वारा तुमने दहेज मृत्यु किया जो धारा – 304–बी, भा. द. वी. के तहत दंडनीय अपराध है।

अथवा

(ii) यह कि तुम अभियुक्त ने उसी दिनांक, समय व स्थान पर मृतिका आशिया से दहेज के रुप में अवैध प्रतिभूति प्राप्त करने के लिये उसे प्रताडित किया, ऐसा कार्य किया जिससे वह आत्महत्या करने के लिए दुष्प्रेरित हुई और आत्महत्या की, जो धारा 306 भा. द. वि. के अंतर्गत दंडनीय अपराध है।

5. The appellant abjured the guilt, pleaded innocence and examined one witness besides himself. The prosecution examined as many as 20 witnesses. Only Manauvar Khan P.W.2, the father of appellant deposed that on a Saturday morning the appellant had asked money from the deceased for bringing ration. Asiya Khatun refused to give money to the appellant and thereafter threw whatever little money she had, on the ground. Upon this, the appellant lifted the money and handing it over to Asiya Khatun, slapped her. It was after this incident that Asiya Khatun sustained burn injuries inside the house and later died on 13.4.2005 due to 95% burn injuries. The learned trial Judge relied upon the sole testimony of Manauvar Khan P.W.2 mentioned in paragraph 28 of the judgment for convicting the appellant under Section 306 of the I.P.C. However, the evidence of Manauvar Khan P.W.2 in paragraph 1, which formed the basis for convicting the appellant under Section 306 I.P.C., was not put to the appellant in his examination under Section 313 Cr.P.C. It was neither

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the prosecution case nor any other prosecution witness and even the accused as a defence witness had stated any such fact. It was, therefore, necessary for the learned trial Judge to put the above mentioned evidence to the accused to give him an opportunity to explain while examining him under Section 313 Cr.P.C. The mandate of Section 313 (1) Cr.P.C. demands that "every incriminating circumstance appearing in evidence especially those circumstances which form the basis for convicting the accused are put to the accused in his examination under Section 313 Cr.P.C. and he is given an opportunity of explaining them."

6. It is settled law that if during the examination of the accused under Section 313 Cr.P.C. such incriminating circumstances which form the basis for convicting the appellant are not put to the accused, it would be a fit case to exercise the power under Section 386 (b) (i) of the Cr.P.C. and to remand the case to the learned trial Judge. Examination of the accused under Section 313 Cr.P.C. is not a mere formality and it is the duty of the Court to examine him on all such incriminating circumstances appearing in evidence against him which may form the basis for his conviction.

7. There is another compelling reason for remanding the case to the learned trial Judge. The appellant was prosecuted under Section 304-B IPC only but besides Section 304-B of the I.P.C. the appellant was also charged in the alternative under Section 306 of the I.P.C. In both the charges, as it would appear from paragraph 4 (supra), it was mentioned that the appellant had harassed Asiya Khatun for obtaining illegal security as dowry which resulted in death of Asiya Khatun under abnormal circumstances within 7 years of her marriage.

8. In order to prove the guilt under Section 304-B of the I.P.C., the following ingredients must be proved by the prosecution beyond reasonable doubt:

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A) That death of a woman is caused by any burn or bodily injury or otherwise than under normal circumstances within 7 years of her marriage;

B) It is shown that soon before her death she was subjected to cruelty on account of a demand for dowry.

9. The learned trial Judge recorded a clear finding that Asiya Khatun died within 7 years of her marriage to the appellant under abnormal circumstances. It also held that the evidence led by the prosecution proved that the appellant had written a letter Article-A to the father of the deceased making a demand for Rs.20,000/- to start a business, failing which the appellant had refused to keep Asiya Khatun with him. It relied on the testimony of Kamarunnisa P.W.4 that Asiya Khatun had told her that during pregnancy the appellant had administered some drug to him and on several occasions the appellant used to make a demand for money. It also relied on her testimony that the appellant had once throttled the deceased with great force. Relying upon the evidence led by the prosecution, it also held that the deceased committed suicide by setting herself on fire since the appellant had demanded illegal security from her. This word "illegal security" has been used in the charge framed by the learned trial Judge under Section 304-B IPC as a synonym for dowry which was reproduced verbatim by the learned trial Judge in para 28 of the judgment. The learned trial Judge also held that on the date of occurrence the appellant asked Asiya for illegal security and upon her refusal treated her with cruelty by slapping her after she threw whatever little money she had, on the ground. However, as against this, in para 25 it was held that the fact that soon before her death, Asiya Khatun was treated with cruelty was not proved.

10. Surprisingly in the concluding paragraph 28 of the judgment, the learned trial Judge initially stated that after appreciation of

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evidence it was not proved beyond reasonable doubt that the appellant had caused dowry death of Asiya Khatun, and therefore, the appellant was acquitted of the charge under Section 304-B of the I.P.C. However, in the very next sentence, the learned trial Judge stated that the prosecution has proved beyond reasonable doubt that on the date of quarrel the appellant had acted with cruelty towards Asiya Khatun on account of obtaining illegal security which instigated Asiya Khatun to commit suicide.

11. The learned trial Judge thus held that the following facts were established beyond doubt by the prosecution:

i) that Asiya Khatun, a deaf and dumb woman, was married to the appellant 4 years prior to her death;

ii) that her death occurred otherwise than under normal circumstances as a result of burn injuries.

iii) that the appellant had demanded a sum of Rs.20,000/- from the father of the deceased vide letter article - A; and

iv) that on the date of occurrence the appellant had acted with cruelty with Asiya Khatun on account of obtaining illegal security.

12. The learned trial Court in paragraph 28 of the judgment while acquitting the appellant under Section 304-B of the I.P.C., has in the very next sentence, stated that the prosecution had proved beyond reasonable doubt that the appellant had treated Asiya Khatun with cruelty on the date of occurrence on account of obtaining illegal security (which was termed as dowry in the charge).

13. Thus, concluding paragraph 28 of judgment of the trial Court creates a serious ambiguity. It is, therefore, necessary in the interest of justice to remand the case and direct the learned trial Judge to remove the ambiguity in para 28 and to record a clear

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finding as to the existence or non-existence of the facts constituting offence under Section 304-B of the I.P.C. This is essential because while the learned trial Judge observed in paragraph 25 of the judgment that soon before her death, the deceased was not harassed on account of demand for dowry, a finding was recorded in paragraph 28 that it was proved beyond doubt that on the date of occurrence the appellant had ill-treated and acted with cruelty with Asiya Khatun on account of a demand for illegal security.

14. For the aforesaid reasons, the case deserves to be remanded to the learned trial Court for giving an opportunity to the appellant to explain those circumstances appearing against him in evidence which formed the basis for his conviction under Section 306 I.P.C. and also to record a clear finding in view of the evidence led by the prosecution whether the guilt of the appellant under Section 304-B of the I.P.C. had been established or not.

15. In the result the impugned judgment dated 27.4.2006 is set aside. The case is remanded to the learned trial judge with a direction to examine the appellant to give an opportunity to him to explain the circumstances appearing against him in the evidence of Manauvar Khan P.W.2 and in view of what has been stated above, after giving an opportunity of hearing to the prosecution and the defence to remove the ambiguity appearing in paragraph 28 of the judgment by recording a clear finding as to the existence or non-existence of the ingredients of the offence under Section 304-B of the I.P.C.

16. The Registry shall direct the concerned Superintendent of Jail to produce the appellant before Shri G.R. Sande, 4th Additional Sessions Judge, (F.T.C.), Raigarh on 17th July 2006.

Sd/-
Dilip Raosaheb Deshmukh
Judge